No. 91-956

In The

Supreme Court of the United States

October Term, 1991

CHRISTOPHER GERDING, *et al.*,

Petitioners,

vs.

REPUBLIC OF FRANCE, MINISTÈRE DES POSTES ET DES TÉLÉCOMMUNICATIONS ET DE LA TÉLÉDIFFUSION, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Was the court of appeals correct in holding that the respondents had engaged in no commercial activity having "substantial contact with the United States" and that, accordingly, the petitioners had failed to establish jurisdiction under the Foreign Sovereign Immunities Act, 28 U.S.C. § 1003(3)(2) (1990)?

2. Was the court of appeals correct in holding that the petitioners had also failed to fulfill the Foreign Sovereign Immunity Act's requirement, 28 U.S.C. § 1605(a)(2) (1990), that an action under that statute be "based upon" a foreign state's commercial activity in the United States?

PARTIES TO THE PROCEEDING BELOW

The respondents agree with the list of parties to the proceeding below as set out in the Petition except as noted below.

The Compañia Telefónica Nacional de España, the Atlantic Cable Maintenance Association [sic], and Claude Voiry were never served with process and thus were not parties to the proceedings below. App. at 2a n.1.

As the district court opinion suggests, service was also never made or attempted on the Republic of France *per se;* the only served entity whose name includes such a designation is, in its entirety, "République Française, Ministère des Postes et des Telecommunications et de la Télédiffusion." App. at 17a. That Ministry is currently denominated simply as the Ministère des Postes et des Telecommunications. The entity named in the complaint at the Compagnie Française des Câbles Sous-Marines is now the Compagnie Generale des Communications, S.A.

The respondents noted in their motion to dismiss that the assertion of jurisdiction over the vessel the *N/C Léon Thevenin* was without basis, independently of any issue of sovereign immunity, in as much as a prerequisit to *in rem* jurisdiction — the presence of the ship within the territorial confines of the jurisdiction at the time the suit was filed or during the pendency of the action did not exist and indeed was not alleged. *Platoro Ltd., Inc. v. Unidentified Remains of a Vessel,* 508 F.2d 1113 (5th Cir. 1975). Dismissing the complaint as against all respondents on other grounds, the district court did not rule specificallyonthis independent ground which precluded the vessel's being a party to the proceedings below.

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OPINIONS BELOW

The opinion of the court of appeals was announced September 5, 1991, and amended November 21, 1991. It is reported at 943 F.2d 521 and reproduced in the Appendix hereto at 1a-15a. The memorandum opinion of the district court was rendered October 25, 1990, and is reproduced in the Appendix at 16a-29a. Citations to the opinions below are hereinafter given as "App. at ____a."

STATEMENT OF THE CASE

A. The Respondents

The respondents are three French governmental entities, together with France Câbles et Radio, S.A. ("FCR") and the Compagnie Générale des Communications, S.A. ("COGECOM"), the current name of the entity formerly known (and named in the complaint) as the Compagnie Française des Câbles Sous-Marins.[1]

The party referred to by the petitioners as the "République Française, Ministère des Postes et des Télécommunications et de la Télédiffusion" was at the time of the proceedings below designated the Ministère des Postes, des Télécommunications et de l'Espace (the "Ministry"). Currently it is simply the Ministère

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1. As noted above in the "Parties to the Proceedings Below" section, the petitioners never attempted to serve the Republic of France, and they made no allegation which could support *in rem* jurisdiction over the vessel N/C *Léon Thevenin*. It appears that the court of appeals took both to be parties to the appeal; to the extent it did, it included them among the parties as to which it affirmed the order of dismissal. App. at 2a n.*, 3a. In the district court proceeding, COGECOM provisionally treated the complaint and the service purportedly effected upon the Compagnie Française des Câbles Sous-Marins as having shown the COGECOM name instead and proceeded on that basis below.

des Postes et des Télécommunications. The Ministry is theunit of the French national government, analogous to a Cabinet-level Department in the United States, responsible for France's mail and telecommunications operations. Among its divisions are the Direction des Télécommunications du Réseau Extérieur ("DTRE") and the Direction des Télécommunications Sous-Marines ("DTS"). App. at 23a n.4. As governmental units, the Ministry, DTRE and DTS are clearly within the definition of a foreign state under the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1602-11 (1990), Pub. L. No. 94-583, § 4(a), 90 Stat. 2892, App. 57a (the "FSIA") (sections of which are hereinafter cited as "Section__"). Section 1603(a). None of them has any operations, employees or property in the United States related in any way to the maintenance and repair of undersea telecommunications cable carried out by the *Léon Thevenin.* App. at 23a n.4.

France Câbles et Radio and COGECOM are *sociétés anonymes* – corporation – organized and existing under the laws of France. All but an infinitesimal percentage of their shares are ultimately owned by the Republic of France.[2] App. at 23a n.4. Each is thus an "agency or instrumentality" of France and deemed a foreign state under the FSIA. Section 1603(a)-(b). Neither conducts any activity, or maintains any office or place of business, in the United States related to the maintenance and repair of undersea telecommunications cable carried out by the *Léon Thevenin.* App. at 23a n.4.

B. Factual Background

In 1983 the American Telephone & Telegraph Company ("AT&T") agreed to sell, install and maintain an undersea fiber optic telecommunications cable system, called Optican 1, for the

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2. COGECOM is the parent of FCR; no other information is relevant under this Court's Rule 29.1.

account of the Compañia Telefónica Nacional de España ("Telefónica"). The Optican 1 cable ran between Spain and the Canary Islands. App. at 3a.

Telefónica arranged for Optican 1 to be maintained through the Atlantic Cable Maintenance and Repair Agreement ("ACMA"), a London-based unincorporated compact of governments and companies which own or repair cables in the Atlantic Ocean. Among the 20 ACMA participants are Telefónica, AT&T and FCR. ACMA matches the various cable repair requests with the available vessels, such the N/V *Léon Thevenin,* capable of doing that specialized work. These "cable ships" are owned by various ACMA participants, and the cable owner making the repair request is billed, through ACMA, for the work done by the assigned vessel. ACMA holds the different participating "cable ships" on standby in assigned geographical areas to attempt best to cover the needs. App. at 3a-4a.

Optican 1 proved unable to withstand shark bites. Accordingly, AT&T worked with its research and development organization, Bell Labs, to create a more resilient fiber optic cable. One of the engineer employees whom Bell Labs assigned to the project was Leslie Gerding. Once the new cable had been developed, AT&T and Telefónica agreed that AT&T would replace the defective Optican 1, while Telefónica would pay for whichever "cable ship" ACMA designated for that mission. App. at 4a.

The vessel which ACMA assigned to replace the Optican 1 was the N/V *Léon Thevenin. AT&T* called a technical meeting to discuss the mission at its New Jersey offices in July 1987. The court of appeals found that Jean Genoux, designated as the *"Chef de Mission,"* attended. ACMA released the *Léon Thevenin* from standby status and directed the vessel to embark upon the Optican 1 mission in September 1987; she thereupon proceeded to Newington, New Hampshire and to Port Covington, Maryland, to load the necessary cable, equipment and crew from AT&T and

Bell Labs. The vessel then sailed for the Canary Islands. App. at 4a.

Leslie Gerding boarded the *Léon Thevenin* off the Canary Islands in late October 1987. Her role was to inspect the failed cable as it was recovered. The vessel encountered very bad weather, however, and Leslie Gerding became seasick. Her condition deteriorated. Although a diabetic, she did not inform any of the ship personnel of her condition. During the early morning of October 28, 1987, she died. App. at 4a-5a.

C. Procedural Background

The petitioners are the survivors and heirs of Leslie Gerding. They seek damages under the Jones Act, 46 U.S.C. § 688 *et seq.*, under a general theory of unseaworthiness, and under the Death on the High Seas Act, 46 U.S.C. §§ 761-68.

An earlier action parallel to the one below had been brought by plaintiffs/appellants against only three defendants: AT&T, Bell Labs and Transoceanic Cable Ship Company, Inc. ("Transoceanic"), another AT&T affiliate. That case was filed in the United States District Court for the Eastern District of Pennsylvania (No. 89-2989). There had been substantial discovery in it; indeed, the three defendants had jointly moved for summary judgment based upon completed discovery. They then stipulated to the dismissal of the Pennsylvania complaint, without prejudice, whereupon the action below was filed in the District of Maryland. In addition to the three original defendants, the Maryland complaint also named Telefónica, ACMA, Claude Voiry (these three were never served), and the respondents. AT&T, Bell Labs and Transoceanic ultimately settled. App. at 2a n.*.

The French respondents, once service on them was attempted, invoked their immunity under the Foreign Sovereign Immunities

Act and moved (for that reason as well as on other grounds) for an order dismissing the complaint as against them. The petitioners argued that jurisdiction should lie under the first subclause of Section 1605(a)(2), which provides that a foreign state forgoes the jurisdictional immunity to which it is otherwise entitled in an action "based upon a commercial activity carried on in the United States by the foreign state. . . ." The appellants sought no additional discovery in relation to the motion to dismiss, relying instead on the facts already known to them.

The district court (Nickerson, J.) ruled:

- that the French respondents had not engaged in the "substantial contact" required to overcome their FSIA immunity (App. at 25a-28a);

- that the sum of the activity in which the petitioners alleged the French parties to have engaged, taken as true, was insufficient even to constitute "minimum contacts" under a traditional due process analysis (App. at 28a);

- and that, in any event, the cause of action failed to meet the FSIA requirement that there be some nexus between the alleged "commercial activity" and the grievance at the basis of the lawsuit (App. at 28a-29a).

The petitioners appealed the district court's dismissal of their complaint. They asserted that the district court had erred with respect to the FSIA, that it had misapplied the burden on the motion to dismiss, and that there should have been no decision in the absence of direct discovery of the French parties. The respondents argued that the district court's holding had been

correct in all respects, and the court of appeals agreed. It held:

- that, inasmuch as the petitioners had never made any effort to obtain discovery directly from the French respondents (although they had taken "extensive discovery of the domestic defendants, and through that discovery learned about the relevant circumstances surrounding Leslie Gerding's death"), the district court had not abused its discretion by ruling on the motion to dismiss (App. at 5a-7a);

- that the district court had properly applied the rules regarding the burden on the motion to dismiss, pursuant to which the petitioners had an obligation "to identify materials of record showing that the defendants were not entitled to immunity," that the respondents had sustained their "ultimate burden of persuasion," and that "the district court properly found, with due regard for the burden's cast .... that immunity was established" (App. at 9a-10a);

- that the "isolated and transitory" commercial activity alleged did not meet the FSIA requirement that such contact be "substantial" (App. at 11a-14a); and

- that the contacts alleged had respectively "no material connection with" and "nothing to do with" the cause of action and thus failed to meet the FSIA's requirement that an action be "based upon" a foreign state's substantial commercial contact with the United States if that sovereign's presumptive immunity from jurisdiction is to be overcome (App. at 14a-15a).

The petitioners seek certiorari through a petition dated December 4, 1990.

SUMMARY OF ARGUMENT

The decision below accords with the broad general understanding of the Foreign Sovereign Immunities Act reflected in fifteen years' judicial interpretation. The lower courts give a common-sense and fact-oriented application to the FSIA's requirement that a foreign state's commercial contact with the United States be "substantial" before it can serve as a predicate to jurisdiction. Due process alone dictates that jurisdiction over any foreign defendant be asserted only with particular care. *Asahi Metal Indus. Co. v. Superior Court of California,* 480 U.S. 102 (1987). The substantiality requirement of the FSIA demands a level of jurisdictional contact for foreign states which is still higher. *Zedan v. Kingdom of Saudi Arabia,* 849 F.2d 1511, 1513 (D.C. Cir. 1988).

The lower courts also agree broadly that the FSIA's requirement that a case be actually "based upon" the foreign state's commercial conduct in the United States requires a clear "nexus" between the cause of action and that local conduct. There must be a direct link between the local activity and the theory and facts of the case; isolated forum contacts or commerce unrelated to the cause of action will not suffice. *E.g., Stena Rederi AB v. Comisión de Contratos del Comité,* 923 F.2d 380 (5th Cir. 1991), and cases discussed therein.

Here, the petitioners failed to allege commercial conduct in the United States sufficient to allow minimum contacts jurisdiction to attach; far less did they meet the FSIA requirement that the commercial contact with this country be "substantial." Moreover, there is a complete lack of nexus between the "commercial

activity" they allege and their cause of action. Their decedent's demise occurred on the high seas while she was working on a French vessel for the Spanish telephone company pursuant to the direction of a quasi-governmental compact based in London; it is simply unrelated to any dockings of the French vessel in United States port or to any attendance at a United States technical planning meeting three months earlier.

Certiorari should be denied, finally, because even a decision by this Court in the petitioners' favor would be of no practical benefit to them: independent grounds, which they did not dispute below, would require a new dismissal of their complaint on any remand.

REASONS FOR DENYING THE WRIT

I.

THE COURT OF APPEALS' INTERPRETATION OF THE FOREIGN SOVEREIGN IMMUNITIES ACT IS CONSISTENT WITH THAT OF ALL COURTS WHICH HAVE ADDRESSED THE ISSUES RAISED.

The petitioners seek a writ of certiorari on the theory that there is a "significant division in the courts" relating to interpretation of the Foreign Sovereign Immunities Act. They maintain that there is "confusion and inconsistency" in application of the FSIA's bar of suits against foreign states which are not "based upon" some "substantial" commercial activity in this country. Petition at 20-21; Sections 1603(e) and 1605(a)(2).

The assertion of such a division among the courts is erroneous. Federal courts have now interpreted and applied the Foreign Sovereign Immunities Act for some fifteen years. That body of jurisprudence is neither confused nor inconsistent. Contrary to the petitioners' argument, and as demonstrated below, there exists

a broad and uniform consensus as to just what the statutory requirements of substantiality and nexus mean.

A. The Decision Below Interprets and Applies the "Substantial Contact" Requirement in a Way Which Accords With the Consistent Approach Taken by the Various Courts of Appeals.

An exception to the Foreign Sovereign Immunities Act's broad general rule that foreign states may not be sued in United States courts exists for cases "based upon a commercial activity carried on in the United States by the foreign state . . . . " Section 1605(a)(2). The statute sets out an additional requirement that any such activity, before it can serve as the basis for an exception to the general FSIA rule of jurisdictional immunity, have "substantial contact with the United States." Section 1603(e).

Although they assert that the decision below "cannot be reconciled with other federal courts' interpretations" of the meaning of "substantial contact" under Section 1603(e), the petitioners themselves never posit an allegedly prevailing definition of that phrase, and far less do they endeavor to explain how the court of appeals fatally deviated from any such generally accepted standard. In the absence of such an exposition, the petitioners' effort to argue that the decision below is irreconcilable with other courts' (alleged, but never defined) understanding of "substantial contact" of course fails from the outset.

The historical and legislative context of the FSIA highlights the importance of the substantiality requirement. In enacting the statute, Congress manifestly wished to create a standard of contact which was higher, and more difficult to establish, for foreign state defendants than was required simply by the due process "minimum contacts" standard exemplified by *International Shoe* and its progeny. *International Shoe Co. v. State of Washington,* 326 U.S. 310 (1945); *Zedan v. Kingdom of Saudi Arabia,* 849 F.2d 1511,

1513 (D.C. Cir. 1988); *Maritime Int'l Nominees Establishment v. Republic of Guinea*, 693 F.2d 1094, 1104-09 (D.C. Cir. 1982), *cert. denied*, 464 U.S. 815 (1983).

That "minimum contacts" standard is itself less "minimal" in application to foreign defendants across the board, including purely private, non-sovereign ones, than in the domestic context. *Asahi Metal Indus. Co. v. Superior Court of California*, 480 U.S. 102 (1987). The explicit FSIA requirement of substantial contact must, then, necessarily represent a higher threshold than that of either simple "minimum contacts" or of the already heightened contact standard applied to private foreign defendants under *Asahi*.

In enacting the FSIA, Congress bypassed any possible "doing business" or "transacting business" provision which would have made any foreign state deemed present in the United States amenable to our courts' jurisdiction. Consistent with the intent to create this higher hurdle for establishing jurisdiction over a foreign state, it also emphasized that no foreign state would be haled into a United States court unless it was engaged in commercial activity having "*substantial* contact" with this country. Section 1603(e) (emphasis added). The FSIA accordingly begins with a general rule that foreign states are immune from the jurisdiction of United States courts. That grounding principle comports with political and diplomatic realities which, in many respects, have as much currency today as in 1812 when Chief Justice Marshall announced the former rule of absolute sovereign immunity, which remained law for well over a century. *The Schooner Exchange v. M'Faddon*, 11 U.S. (7 Cranch) 116 (1812).

A foreign state's presumptive immunity from United States jurisdiction holds unless and until it is shown to fit exactly into one of the precisely tailored exceptions spelled out in the FSIA itself. The FSIA is the sole basis for asserting jurisdiction over

a foreign state in a United States court; if there is no FSIA exception to its general rule of immunity, then there is no jurisdiction. *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428 (1989).

The cases confirm the importance of the substantiality requirement of the FSIA. A given set of facts which would be sufficient to predicate jurisdiction under a "minimum contacts" due process standard may well nonetheless fail to constitute the *substantial* contact required by the FSIA before a foreign state's commercial activity in the United States will subject it to jurisdiction here. *Harris v. VAO Intourist Moscow*, 481 F. Supp. 1056, 1059 (E.D.N.Y. 1979); *Verlinden, B. V. v. Central Bank of Nigeria*, 488 F. Supp. 1284, 1295-97 (S.D.N.Y. 1980), *aff'd on other grounds*, 647 F.2d 320 (2d Cir. 1981), *rev'd on other grounds*, 461 U.S. 480 (1983).

The decisions mustered by the petitioners in an effort to support their mistaken contention that the substantiality requirement is "easily satisfied" do not support such a proposition.[3] They show only that, as the petitioners recognize at the outset of their own discussion, any inquiry into what is or is not "substantial" must inevitably be keyed to a detailed analysis of the precise facts of the given case. Thus, courts have held that "substantial commercial contact" with the United States exists where a state-owned company makes pistols and contracts to sell them into the United States market, *Ohntrup v. Firearms Center, Inc.*, 516 F. Supp. 1281 (E.D. Pa. 1981), *aff'd without opinion*, 760 F.2d 259 (3d Cir. 1985), or where a government entity comes into the United States

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3. One of those cases is a district court opinion in which the finding of jurisdiction over the foreign state defendant was reversed on appeal, in a decision not cited by the petitioners. *Maritime Int'l Nominees Establishment v. Republic of Guinea*, 505 F. Supp. 141 (D.D.C. 1981), *rev'd*, 693 F.2d 1094 (D.C. Cir. 1982), *cert. denied*, 464 U.S. 815 (1983).

to purchase wheat and to arrange for the carriage of the goods out of this country. *Ministry of Supply, Cairo v. Universe Tankships, Inc.*, 708 F.2d 80 (2d Cir. 1983) (rejecting argument of foreign sovereign plaintiff that court lacked jurisdiction over cross claims against it).

Those cases, like the others cited by the petitioners, do not announce or even imply that the substantiality requirement of the statute is anything less than its plain language suggests, and far less that the requirement is mere window dressing which requires only a bit of lip service to fulfill. Rather, they show that the requirement can only be applied, on a case by case basis, to the facts of individual new cases as they arise.

That is precisely the careful fact-oriented approach taken below, leading to the holding that the petitioners' lawsuit fell under no FSIA exception and therefore required dismissal. The court of appeals alluded to the requirement of "substantial" contact no fewer than six times. App. at 11a-14a. In so doing, it did not adopt any definition or understanding of "substantial" which put it at odds with the statute, with the plain meaning of the word "substantial," or with the similarly plain understanding of the same word by other courts.[4]

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4. The petitioners' final charge that the court of appeals' understanding of "substantial" contact "represents a radical departure" from an (undefined) understanding of that word by other courts is puzzling. Petition at 24. They begin by accurately noting that the purpose of an activity is irrelevant in determining its commercial or non-commercial character, an observation which has nothing to do with whether such activity has "substantial contact with the United States." From there, however, the petitioners inexplicably leap to the conclusion that the court of appeals erred when it commented that the key alleged United States contact of the respondents was a claimed attendance at one "technical" meeting. Petition at 23-24. Although their implication is unclear, the petitioners are certainly mistaken if they mean to insinuate that the court of appeals found that because the alleged meeting was "technical" it was not

(Cont'd)

B. The Decision Below Interprets and Applies The FSIA's "Based Upon" Requirement in a Way Which Accords With the Consistent Approach Taken by the Various Courts of Appeals.

The Foreign Sovereign Immunities Act provides that the commercial activities exceptions to the general rule of foreign sovereign immunity apply only in those actions which are directly "based upon" certain defined commercial activity in or directly affecting the United States. Section 1605(a)(2). Federal courts broadly agree that this "based upon" requirement means quite simply what it says: that the alleged commercial conduct of the foreign state in the United States must have a material connection to a real "nexus" with the plaintiff's cause of action. *E.g., Zedan v. Kingdom of Saudi Arabia,* 849 F.2d 1511 (D.C. Cir. 1988); *Barkanic v. CAAC,* 822 F.2d 11 (2d Cir.), *cert. denied,* 484 U.S. 964 (1987); *Velidor v. L/P/G Benghazi,* 653 F.2d 812 (3d Cir. 1981), *cert. dismissed,* 455 U.S. 929 (1982); *Gerding,* App. at la; *Stena Rederi AB v. Comisión de Contratos del Comité,* 923 F.2d 380 (5th Cir. 1991); *Gould, Inc. v. Pechiney Ugine Kuhlmann,* 853 F.2d 445 (6th Cir. 1988); *Santos v. Compagnie Nationale Air France,* 934 F.2d 890 (7th Cir. 1991); *America West Airlines, Inc. v. GPA Group, Ltd.,* 877 F.2d 793 (9th Cir. 1989); *Nelson v. Saudi Arabia,* 923 F.2d 1528 (11th Cir. 1991), *petition for cert. filed,* 59 U.S.L.W. 2532 (U.S. Sept. 26, 1991) (No. 91-522) (Solicitor General invited to file brief, Nov. 18, 1991 (per curiam)).

The approach of the court of appeals below is entirely consistent with, and indeed is explicitly pegged to, this broad judicial understanding of the import of the "based upon"

(Cont'd)
"commercial." What the court below did find was that the alleged commercial contacts of the respondents with the United States, all taken to be true as alleged, were not "substantial" but rather were "isolated and transitory." App. at 12a.

requirement. The Fourth Circuit thus agreed that there is "implicit in the statute" a requirement that there be a "nexus between the commercial activity in the United States and the plaintiff's cause of action." App. at 11a. It cited approvingly the Fifth Circuit's holding just a few months earlier that this "connection" must be "material"; thus, "[i]solated or unrelated commercial actions of a foreign sovereign in the United States are insufficient to support a commercial activities exception to sovereign immunity." App. at 14a (quoting *Stena Rederi,* 923 F.2d at 387 (omitting citations)).

As would be expected in the case of a major statute with fifteen years of judicial interpretation behind it, the explication of the FSIA's "based upon" requirement, while consistent from court to court, has not always been made in precisely the same words. More often than not, the requirement is phrased as one of "'jurisdictional nexus' between the acts for which damages are sought and the foreign sovereign's commercial activity." *Nelson,* 923 F.2d at 1534. The "nexus" formulation has been embraced by several courts over the past many years. *E.g., Compañia Mexicana de Aviación v. United States District Court,* 859 F.2d 1354, 1360 (9th Cir. 1988); *Vencedora Oceánica Navigación, S.A. v. Compagnie Nationale Algeriénne de Navigation,* 730 F.2d 195, 200-02 (5th Cir. 1984) (per curiam); *Barkanic,* 822 F.2d at 13; *Velidor,* 653 F.2d at 820; *Stena Rederi,* 923 F.2d at 386-87; *Santos,* 934 F.2d at 892; *America West,* 877 F.2d at 796-97; *Nelson,* 923 F.2d at 1534.

Other courts, entirely consistently with the "nexus" decisions, have found that the "based upon" language reflects a requirement that there be a "connection" between the foreign state's commercial activity and the wrong complained of in the lawsuit. *Gould,* 853 F.2d at 452. The court of appeals in the present case discussed both "connection" and "nexus." App. at 14a-15a.

The "based upon" requirement has also been understood to suggest that the acts sued upon must be "part and parcel" of the foreign state's commercial activity in the United States or that they must be an "integral part" of that activity. *Castillo v. Shipping Corp. of India,* 606 F. Supp. 497, 501 (S.D.N.Y. 1985) (quoting respectively *Gemini Shipping, Inc. v. Foreign Trade Org. for Chemicals and Foodstuffs,* 647 F.2d 317, 319 (2d Cir. 1981) and *Ministry of Supply, Cairo v. Universe Tankships, Inc.,* 708 F.2d 80, 84 (2d Cir. 1983)).

In *Castillo,* an admiralty suit for personal injury with significant parallels to the present case, the court determined that, although the foreign sovereign defendant did carry on substantial commercial activity in the United States, the "based upon" clause nonetheless foreclosed jurisdiction:

> Neither the act complained of nor the injury sustained had any impact on or tie to [sovereign defendant] SCI's commercial activities in this country. The plaintiff's alleged injuries were caused by acts that occurred in the Dominican Republic on a foreign government-owned ship, on a voyage having no connection with the United States. This lawsuit's only link to SCI's shipping activities in the United States is that it occurred on one of the defendant's 144 vessels, some of which occasionally call at United States ports. The mere happenstance of an accident on one of SCI's ships moored anywhere in the world cannot convert an ordinary negligence action into one "based upon" SCI's United States activities. To hold otherwise would rob the words "based upon" of all meaning . . . .

606 F. Supp. at 501-02.

Still other courts have perceived in the "based upon" provision a requirement that the foreign state's commercial activities in the United States "establish a legal element of the claim." *Santos v. Compagnie Nationale Air France*, 934 F.2d 890, 893 (7th Cir. 1991) (citing *Callejo v. Bancomer, S.A.*, 764 F.2d 1101, 1109 (5th Cir. 1985) and *Gilson v. Republic of Ireland*, 682 F.2d 1022, 1027 n.22 (D.C. Cir. 1982)). In that vein, it has also been held that "the commercial activity relied on by [the plaintiff] to establish jurisdiction must be the activity upon which the lawsuit is based. The focus must be solely upon 'those *specific* acts that form the basis of the suit.'" *America West*, 877 F.2d at 796-97 (citation omitted; emphasis in original) (quoting *Joseph v. Office of the Consulate General*, 830 F.2d 1018, 1023 (9th Cir. 1987), *cert. denied*, 485 U.S. 905 (1988)).

One of the earliest considerations of the import of the "based upon" clause remains one of the most helpful. *Verlinden, B. V. v. Central Bank of Nigeria*, 488 F. Supp. 1284 (S.D.N.Y. 1980), *aff'd on other grounds*, 647 F.2d 320 (2d Cir. 1981), *rev'd on other grounds*, 461 U.S. 480 (1983). In dismissing for want of FSIA jurisdiction, Judge Weinfeld noted that by enacting the "based upon" requirement Congress had created a "much narrower basis for jurisdiction" than the "traditional tests" which inquire only whether a defendant is "present" or "doing business." 488 F. Supp. at 1295. The FSIA adds an additional required layer of interrelation: by its terms, "the plaintiff's cause of action must be *'based upon'* the commercial activity [of the foreign sovereign] . . . . [W]e take this to mean that there must be a close connection between the cause of action asserted and the jurisdictional facts on which it is based." *Id.* at 1295-96 (emphasis in original; footnotes omitted). *Accord Magnus Electronics, Inc. v. Argentine Republic*, 637 F. Supp. 487, 492 & n.8 (N.D. Ill. 1986) (finding that "based upon" requires a more direct nexus than "arises from" and that it implies a "proximate-cause relationship"), *modified*, 830 F.2d 1396 (7th Cir. 1987).

The FSIA, in sum, manifests a clear legislative purpose to make foreign states subject to United States jurisdiction only if they engage in "substantial" commercial activity and only if a lawsuit is directly "based upon" that very activity. An array of decisions has applied that statute consistently for fifteen years. The petitioners' efforts to discern any significant differences among judicial interpretations thus fail.

Dozens of federal judges do not and cannot speak with a single voice in interpreting any one statute. That simple fact does not, however, create a "split in authority." In construing both the "based upon" and the "substantiality" requirements of the FSIA, the federal judiciary has used a consistent overall approach to analyze myriad highly individualized fact patterns. The petitioners mistake the varying results, obtained from that broadly consistent application of the statute to entirely different sets of facts, for "confusion and inconsistency."

II.

THE DECISION OF THE COURT OF APPEALS WAS CORRECT.

The petitioners maintain that the decisions below erroneously adjudicated the facts of this case. They argue, contrary to the holdings of the district court and of the court of appeals, that the respondents did have "substantial" commercial contact with the United States and that this cause of action is "based upon" that contact. Petition at 32-41.

In fact, the district court, taking the allegations of the plaintiffs-petitioners as true and construing them in the light most favorable to them, held that those allegations failed even to establish that minimum contacts jurisdiction could lie consistently with Constitutional dictates. App. at 28a. Far less could those

same allegations, however favorably construed, suffice to meet the more rigid FSIA standard requiring that a foreign state's commercial activity in the United States be "substantial" as a prerequisite to any abrogation of that sovereign's presumptive immunity from United States jurisdiction.

The courts below agreed that even if the respondents were, contrary to reality, deemed to have "substantial" United States commercial activity, then that activity in any event did not have the type of close relationship, or nexus, with the cause of action which the FSIA additionally requires before a foreign state may be subjected to jurisdiction here. App. at 14a-15a, 28a-29a.

A. The Respondents Were Not Engaged in "Commercial Activity" Having "Substantial Contact With the United States."

The petitioners maintain that the lower courts erred in ruling that the French respondents were not carrying on substantial commercial activity in the United States. However, as the court of appeals noted, the district court, taking all the plaintiffs-petitioners' allegations to be true and construing them in the light most favorable to them, concluded not only that had they failed to satisfy the FSIA requirement of "substantial contact," but that they had failed even to make allegations sufficient to bring their case within the ambit acceptable under the considerably looser due process requirements associated with a "minimum contacts" standard.[5] App. at 12a, 28a; *see Zedan v. Kingdom of Saudi*

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5. The district court's finding, of which the court of appeals seems to approve but upon which it does not explicitly pass, is correct. For even "minimum contacts" jurisdiction to attach, there must be "some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protection of its laws." *Hanson v. Denckla*, 357 U.S. 235, 253 (1958). Thus, "the defendant's conduct and connection with the forum state [must be] such that he should reasonably anticipate being haled into court there." *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980).

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Arabia, 849 F.2d 1511, 1513 (D.C. Cir. 1988) (FSIA substantiality requirement greater than that of due process alone).

The French respondents, in the proceedings below, submitted affidavits showing that each was a "foreign state" within the definition of the FSIA. The district court found that to be the case, and the court of appeals affirmed. App. at 8a. Because the plaintiffs-petitioners had failed to comply with the legal requirement that any lawsuit against any foreign state be brought pursuant to the FSIA and thus had not identified any FSIA exception under which they asserted jurisdiction, the respondents were obliged to inventory the statutory exceptions and to demonstrate the necessary inapplicability of each to themselves. App. at 9a-10a. Thus, the declarations showed that none of the respondents maintained offices or conducted any activity in the United States related to the maintenance and repair of undersea telecommunications cable. App. at 23a n.4.

The petitioners nonetheless argue that they allege "activity" sufficient to constitute the "substantial contact" required by the FSIA before sovereign immunity can be pierced. *See* App. at 44a-49a. According to their theory, the fact that the N/C *Léon Thevenin* was ordered by a third party, ACMA, to proceed for the convenience of other third parties to United States ports, coupled with the alleged presence of one respondent's employee at one technical planning meeting in New Jersey, should create jurisdiction.

(Cont'd)

The respondents here were not alleged to have engaged in any action of the type required to satisfy this Court's minimum contacts due process standards. Moreover, as foreign defendants, even putting aside their sovereign immunity, they enjoy the benefit of this Court's warning that courts should show "an unwillingness to find the serious burdens of an alien defendant outweighed by minimal interests on the part of the plaintiff or the forum State." *Asahi Metal Indus. Co. v. Superior Court of California*, 480 U.S. 102, 115 (1987).

The *Léon Thevenin* never entered any United States port in furtherance of commerce carried on in the United States by any of the respondents. The petitioners acknowledged below that "the French were supplying the N/C *Léon Thevenin* only because the ACMA's management committee had determined that it was the most convenient ship for AT&T's mission." Response to Motion to Dismiss (District Court Docket No. 29) at 8. In other words, the vessel had not been sent to the United States by any of the respondents. Once arrived, she did not enter into United States commerce through the loading of cargo; the ship, fitted as a cable-laying vessel, is by definition unable to do so. Instead, the *Léon Thevenin* was there solely to obey the dictates of ACMA in relation to a repair of Spanish telecommunications cable on the other side of the ocean.[6]

The New Jersey technical meeting also dealt exclusively with the project for the Spanish telephone company off the Canary Islands. It is not alleged to have concerned any ongoing activity of any of the respondents in the United States marketplace concerning cable repair or maintenance, nor, in light of the absence of any such activity of the respondents here, could any such allegation have credibly been made. The meeting could as easily have been held in the Paris offices of the respondents, in London, the seat of ACMA, or in Madrid, in the offices of the Spanish telephone company. As the petitioners themselves conceded below, any attendance of one representative of one respondent at the

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6. Jurisdiction has been found lacking even on simple due process "minimum contacts" grounds in other admiralty cases in which a non-sovereign defendant had greater forum contacts than those alleged here. *Grevas v. M/V Olympic Pegasus*, 557 F.2d 65 (4th Cir.), *cert. denied*, 434 U.S. 969 (1977) (forum contacts including loading commercial cargo, undergoing inspection, sending crew members for medical examinations, and hiring new personnel insufficient to support jurisdiction under due process requirements); *King v. McAllister Bros., Inc.*, 659 F. Supp. 39 (S.D. Ala. 1987) (defendant had solicited tug captain plaintiff's employment in forum).

New Jersey technical meeting was solely in response to the summons of ACMA, a London-based compact, in respect of work to be done on the high seas for the account of the Spanish national telephone company.

As the courts below inevitably found, the activity alleged by the plaintiffs-petitioners, both with respect to the ship and to the single New Jersey meeting, was no more than 'isolated and transitory.' " App. at 11a-12a. As such, the alleged contacts fall far short of meeting the FSIA requirement that they be "substantial" before they can serve as a predicate for any damages action against a foreign state.

B. This Cause of Action Is Not "Based Upon" Any Commercial Activity of the Respondents.

The court of appeals, like the district court, proceeded to consider the purely hypothetical proposition that the allegations were somehow taken to provide an adequate basis for finding that the FSIA-required substantial commercial contact with the United States did exist. That analysis led it to agree with the lower court's conclusion that "even if the Gerdings had satisfied the 'substantial contact' requirement, they still would not be able to fulfill the FSIA's nexus requirement." App. at 14a.

The burden of the petitioners' argument is that their case is somehow "based upon" the only United States "contacts" of the respondents which they have alleged: the docking of the cable-laying vessel in United States port and the supposed attendance of one person at a planning meeting held in New Jersey to prepare the technical aspect of the mission some three months before the tragic death occurred. Clearly, however, neither of those "contacts" has any relation to the basis of this lawsuit.

This case *is* "based upon" a death in the course of a nautical

cable-laying mission undertaken at the request of the Spanish national telephone company, under the aegis and at the specific direction of London-based ACMA, while the vessel was on the high seas bound from the Canary Islands toward Spain. It is *not* "based upon" anything that happened in the course of a technical planning meeting three months earlier in the United States or in the course of the cable-laying vessel's calling, on ACMA's orders, in United States port.

The petitioners' arguments concerning duty and "but for" causation cannot mask the fortuitous and attenuated nature of the alleged United States contacts. The mere possibility that one event may stand in a time-sequential relationship with another does not create the causal nexus required to fulfill the FSIA's "based upon" clause. *See Magnus Electronics, Inc. v. Argentine Republic*, 637 F. Supp. 487, 492 (N.D. Ill. 1986), *modified on other grounds*, 830 F.2d 1396 (7th Cir. 1987). "But for" the fact that the *Léon Thevenin* was ever constructed, petitioners' decedent would not have died aboard it; that does not, however, establish a link entitling them to sue the shipbuilders for damages any more than such a link to the respondents is established by the allegations that, long before the tragic events, the vessel was in United States port or that an employee attended a meeting in New Jersey. As the court of appeals held, the New Jersey meeting has no "material connection" to this cause of action, and the "case has nothing to do with" any docking of the vessel in United States ports. App. at 14a-15a. *See Compañia Mexicana de Aviación v. United States District Court*, 859 F.2d 1354, 1360 (9th Cir. 1988) (no nexus when airplane serviced in Chicago the day before crashing in Mexico).

III.

THIS CASE IS UNSUITABLE FOR REVIEW BY THIS COURT BECAUSE IT TURNS PRIMARILY ON FACT RATHER THAN ON LAW AND BECAUSE UNDISPUTED MATTERS UNRELATED TO THE QUESTIONS PRESENTED INDEPENDENTLY REQUIRE DISMISSAL.

In seeking a writ of certiorari, the petitioners assert that the questions presented are of great national and international importance and that their allegedly unsettled nature should impel this Court to review those matters and give clear direction on them. Petition at 30-32. As shown above, there is in fact no conflict or confusion in interpretation of the Foreign Sovereign Immunities Act, and there is accordingly no reason for the Court to exercise its discretion to review this case.

There are, however, additional reasons which make this case an unsuitable one for a writ of certiorari. First, as the above discussion reveals, its resolution turns essentially upon issues of fact rather than of law. Second, the district court was presented with matters, undisputed by the plaintiffs-petitioners, which would have required the dismissal of this action independently of the FSIA grounds on which the decision was based. The district court, and thus the court of appeals, felt no need to address those matters in light of the dismissal of the complaint on other grounds, but even a reversal on FSIA grounds would lead only to a dismissal of the complaint on separate and undisputed grounds.

A. The Petitioners' Argument Is Primarily Factual.

This Court's Rule 10.1 states that "special and important reasons" must be shown for a writ of certiorari to be granted and lists examples of such potential reasons, all of which focus on resolution of issues of *law*. As shown above, however, there

is no confusion or inconsistency in the views of the lower courts as they interpret and apply the Foreign Sovereign Immunities Act. The real question in the petition for certiorari is whether the particular set of *facts* alleged in the complaint can give rise to jurisdiction under that statute.

The petitioners do not identify any prevailing standard of FSIA interpretation from which the court of appeals allegedly deviated when it affirmed the dismissal of their complaint. Neither do they identify any theory of interpretation as articulated in even a single case which would, if applied to these facts, lead to a different result. Instead, they argue that the decisions below, under whatever standard, were just wrong. Petition at 38.

The principal question in this case has been and remains whether the petitioners alleged facts sufficient to make out a case "based upon" any "substantial" commercial contact of the French respondents in the United States. The reason that the answer to that question is "no" – as revealed especially by the district court's conclusion that those allegations were not even sufficient to make out the *minimum* contacts required by due process – has nothing to do with any aberrant interpretation of the law and everything to do with the facts themselves.

B. The Dismissal of the Complaint Was Independently Required by Matters Unrelated to the Questions Presented.

The respondents' filing in the district court was entitled "Motion to Dismiss for Lack of Jurisdiction *and Improper Venue*" (emphasis added). It explained that the District of Maryland was not a proper venue under 28 U.S.C. § 1391(f) and specifically moved for dismissal on that additional ground. The same motion also noted the plaintiffs-petitioners' failure to effect service consistent with the requirements of the FSIA as well as the statutory insufficiency of the process itself. Section 1608. These

deficiencies, which independently required dismissal of the complaint, were never denied by the petitioners. The district court found it unnecessary to rule on these issues in light of its disposition on broader FSIA grounds. App. at 29a n.5.

From a purely practical perspective, then, even a hypothetical grant of the petition for certiorari followed by a reversal and remand would be an exercise in futility for the petitioners, inexorably leading as it would only to a renewed dismissal on separate grounds which the petitioners themselves have never contested.

Both the fact-based nature of the petitioners' argument and the uncontested grounds independently requiring dismissal of the complaint make their petition for certiorari an unsuitable one.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari to the United States Court of Appeals for the Fourth Circuit should be denied.

Respectfully submitted,

RONALD R. ALLEN, JR.
Counsel of Record
for Respondents

MARK D. GATELY
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JEFFREY G. COOK

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT DATED SEPTEMBER 5, 1991

Christopher GERDING, Administrator of the Estate of Leslie Margaret Gerding, Deceased; Christopher Gerding, Individually; Charles Christian Gerding, Individually; Joan Fraser Gerding, Plaintiffs-Appellants,

-v-

REPUBLIC OF FRANCE; Ministere Des Postes Et Des Telecommunications Et de La Telediffusion; France Cables & Radio; Direction Des Telecommunications Sous-Marines; Direction Telecommunications Reseau Exterieur; Companie Francaise Des Cables Sous-Marines; N/C LEON THEVENIN, in rem in the Atlantic Ocean; Claude Voiry, M.D.; Atlantic Cable Maintenance Association, Jointly and Severally; Compania Telefonica National de Espana, a corporation organized and existing under the laws of Spain, a/k/a CTNE, a/k/a Telefonica, and having its principal office at Madrid, Spain, Defendants-Appellees,

and

Transoceanic Cable Ship Co.; American Telephone and Telegraph Company, Bell Labs; Bell Telephone Laboratories, Incorporation, Defendants.

No. 90-2503

United States Court of Appeals, Fourth Circuit

Argued May 6, 1991.

Appendix A

Decided Sept. 5, 1991.

As Amended Nov. 21, 1991.

Ronald Roger Allen, Jr. (Joseph D. Pizzurro, Curtis, Mallet-Prevost, Colt & Mosle, New York City, David M. Feitel, Jeffrey G. Cook, Miles & Stockbridge, Baltimore, Md., on brief), Curtis, Mallet-Prevost, Colt & Mosle, New York City, for defendants-appellees.

Edmund J. O'Meally, Blum, Yumkas, Mailman, Gutman & Denick, P.A., Baltimore, Md. Robert A. Kosseff, Trubman, Chaiken & Kosseff, David L. Lockard, Philadelphia, Pa., on brief, for plaintiffs-appellants.

Before PHILLIPS, Circuit Judge, CHAPMAN, Senior Circuit Judge, and KELLAM, Senior District Judge for the Eastern District of Virginia, sitting by designation.

PHILLIPS, Circuit Judge:

The personal representative and survivors of Leslie Gerding (collectively, the Gerdings) appeal the district court's dismissal of their action seeking damages for the death of Leslie Gerding against the Republic of France and other French officials and agencies (hereinafter "French defendants")* on the grounds of

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* The French defendants include: The Republic of France, the Ministere des Postes et des Telecommunications et de la Telediffusion (now designated the Minstere des Postes, des Telecommunications et de l'Espace), the Direction des Telecommunications du Reseau Exterieur, the Direction des Telecommunications Sous-Marines, France Cables et Radio, S.A., the Compagnie Francaise des Cables Sous Marines (now the Compagnie Générale des Communications, S.A. ("COGECOM")) and the *N/C Leon Thevenin.*

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immunity under the Foreign Sovereign Immunities Act (FSIA). The Gerdings claim that the district court should have allowed discovery before ruling on the motion to dismiss, and that in any event the record does not support the court's conclusion that the French defendants are immune to suit. Because the Gerdings failed timely to seek discovery and because the district court did not err in finding immunity under the FSIA, we affirm.

I.

In 1983, AT & T sold Optican 1, an undersea fiber optic deep water cable system to the Compania Telefonica Nacional de Espana (Telefonica). Under the sales contract, AT & T agreed to install the Optican I cable between Spain and the Canary Islands. In 1985, Telefonica made Optican 1 part of the Atlantic Cable Maintenance Agreement (ACMA). The London-based ACMA consists of governments and companies that own or repair cables in the Atlantic Ocean. Telefonica, AT & T, and France Cables et Radio (FCR) all participate in the ACMA. The ACMA takes care of cable maintenance requests by matching the requests with available "cable ships," including the *N/C Leon Thevenin*, vessels which specialize in repairing cables. Each "cable ship" is individually owned by an ACMA-participating country. The ACMA assigns the ships to geographical zones where they stay on standby until they are assigned to a repair mission. When a

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The Gerdings also named AT & T, Bell Labs, and Transoceanic Cable Ship Company, Inc. as defendants. The Gerdings settled with these three defendants. The remaining defendants, who are not involved in the present appeal, are Claude Voiry, M.D.; the Atlantic Cable Maintenance Association (ACMA); and Compania Telefonica Nacional de Espana, a/k/a CTNE (Telefonica).

cable ship is assigned to a repair job, ACMA bills the cable owner requesting the repair.

As it turned out, Optican 1 failed because it could not withstand shark bites. AT & T then asked Bell Labs, its research and development organization, to manufacture a cable that would be protected from fish bites. Leslie Gerding, a Bell Lab employee, was assigned to this project. AT & T made an agreement with Telefonica pursuant to which AT & T would install the new cable and Telefonica would pay the bill for the cable ship assigned by the ACMA. The ACMA assigned the French vessel, the *N/C Leon Thevenin,* for this mission. The *N/C Leon Thevenin is* wholly owned by FCR and is used only for undersea cable maintenance and repair.

In July 1987, AT & T held a meeting to discuss the Optican 1 repair mission at its New Jersey offices. Jean Genoux, the "Chef de Mission" of the *N/C Leon Thevenin* Optican 1 mission attended this meeting. At this time the *N/C Leon Thevenin* was on standby status in Wilmington, North Carolina. In September 1987, the ACMA released the *N/C Leon Thevenin* from standby status and called it to Newington, New Hampshire, so that the new cable could be loaded. From there, the vessel proceeded to Port Covington, Maryland where AT & T and Bell Lab personnel loaded equipment, engineers, and crew. The *N/C Leon Thevenin* then sailed to the Canary Islands to complete its mission.

Leslie Gerding boarded the *N/C Leon Thevenin* in October 1987 when the boat was anchored off the coast of the Canary Islands. She did not tell the captain, the chef de mission, or other ship personnel that she was diabetic. During its mission, the ship encountered rough weather and Gerding became very seasick. On October 27, 1987, Leslie Gerding was admitted to the ship's

infirmary. Early the next morning, Leslie Gerding died.

The Gerdings then brought this action against the French defendants alleging their liability for Leslie Gerding's death under the Jones Act, the Death on the High Seas Act, and the general maritime law of unseaworthiness. The basic theory of the claim against the French defendants was that chef de mission Genoux should have told AT & T representatives at the New Jersey meeting that he needed the medical records of Bell Lab employees who would be aboard the *N/C Leon Thevenin;* and that in consequence of his negligent failure to do so, Leslie Gerding's condition was not known and resulted in inadequate treatment on board the *N/C Leon Thevenin.* As indicated, the district court dismissed the action as to the French defendants on the basis that they were immune under the FSIA.

This appeal followed.

II.

The Gerdings first contend that the district court abused its discretion by ruling on the French defendants' motion to dismiss without any discovery having been conducted against those defendants. Specifically they contend that the district court's ruling on immunity was premature, given that they had not conducted discovery on such issues as whether certain French defendants were really instrumentalities of the French government, whether there were any more contacts between the French defendants and the United States, and the nature of Jean Genoux's responsibilities both at the New Jersey meeting and on board the *N/C Leon Thevenin.*

However, the Gerdings never sought discovery against the

French defendants in the district court. This is not a case where the district court arbitrarily denied plaintiffs' discovery requests; rather the district court proceeded to rule on the motion to dismiss without any discovery efforts or requests having been made. Although the Gerdings acknowledge that they did not request any discovery in the district court, they claim that the record did not contain sufficient information for the district court to rule on the FSIA issue. The Gerdings contend that under these circumstances, justice requires that we should remand the case to the district court to permit them to make the discovery they identify as critical to ruling on the immunity defense. We disagree.

In *Singleton v. Wulff*, 428 U.S. 106, 120, 96 S.Ct. 2868, 2877, 49 L.Ed.2d 826 (1976), the Supreme Court made the point critical to the fair conduct of adversarial proceedings that "[i]t is the general rule, of course, that a federal appellate court does not consider an issue not passed upon below." 428 U.S. at 120, 96 S.Ct. at 2877. And we have held in furtherance of that critical principle of our litigation system, that "[q]uestions not raised and properly appealed in the trial forum will not be noticed on appeal, in the absence of exceptional circumstances." *United States v. One 1971 Mercedes Benz*, 542 F.2d 912, 915 (4th Cir.1976). This case does not present such "exceptional circumstances." Although the Gerdings deny the French defendants' suggestion that the Gerdings did not seek discovery because they thought the record was sufficient as it stood to withstand an FSIA defense, they do not offer any alternative explanation for their failure to pursue any discovery against the French defendants. The Gerdings did conduct extensive discovery of the domestic defendants, and through that discovery learned about the relevant circumstances surrounding Leslie Gerding's death. The nature of the French defendants' participation in the mission during which Leslie Gerding died was apparent from the record developed through

discovery of the domestic defendants and the French defendants' own declarations and affidavits.

We conclude that under these circumstances, the district court did not abuse its discretion by ruling on the French defendants' motion to dismiss in the absence of any discovery of those defendants on matters relevant to their immunity defense.

III.

The Gerdings then contend that even on the record before it, the district court erred in finding the French defendants immune to this action.

The first question in assessing an immunity defense under the FSIA is whether the particular defendants qualify as "foreign states" within the meaning of 28 U.S.C. § 1603. That statute provides in relevant part:

> (a) A "foreign state," . . ., includes a political subdivision of a foreign state of any agency or instrumentality of a foreign state as defined in subsection (b).
>
> (b) An "agency or instrumentality of a foreign state" means any entity
>
> (1) which is a separate legal person, corporate or otherwise, and
>
> (2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign

> state or political subdivision thereof, and
>
> (3) which is neither a citizen of a State of the United States as defined in section 1332(c) and (d) of this title, nor created under the laws of any third country.

28 U.S.C. § 1603. The district court concluded that all of the French defendants fit this definition of foreign state. The Gerdings point to nothing in the record before the court that suggests any error in the court's ruling on this threshold matter. Their only contention is that discovery might have uncovered information that would draw the ruling in question. But that possibility, as we have held in Part II, has simply been foreclosed by the Gerdings' own litigation strategy. We therefore affirm the court's conclusion on this threshold point.

The next issue is whether the foreign state defendant has immunity from suit in the United States courts. Under 28 U.S.C. § 1604,

> Subject to existing international agreements to which the United States is a party at the time of enactment of this Act a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter.

Thus a foreign state is immune under FSIA unless one of the exceptions is applicable. The Gerdings rely upon the "commercial activity" exception provided in § 1605(a)(2) to avoid the French defendants' immunity defense. We conclude that the district court did not err in finding the exception not applicable.

Appendix A

At the outset, the Gerdings contend that the district court erred by placing upon them the burden of establishing subject matter jurisdiction, i.e., of disproving immunity. They cite *Gould, Inc. v. Pechiney Ugine Kuhlmann,* 853 F.2d 445, 451 n. 5 (6th Cir. 1988) in which the Sixth Circuit quoted the House of Representatives Report on the FSIA, which provided:

> [T]he burden will remain on the foreign state to produce evidence in support of its claim of immunity. Thus, evidence must be produced to establish that a foreign state or one of its subdivisions, agencies or instrumentalities is the defendant in the suit and that the plaintiff's claim relates to a public act of the foreign state that is, an act not within the exceptions in sections 1605-1607. Once the foreign state has produced such prima facie evidence of immunity, the burden of going forward would shift to the plaintiff to produce evidence establishing that the foreign state is not entitled to immunity. The ultimate burden of proving immunity would rest with the foreign state.

Id. quoting H.R.Rep. No. 1487, 94th Cong., 2d Sess. 1, 17, *reprinted in* 1976 U.S. Code Cong. & Admin.News 6604, 6616. Although the district court may not have specifically mentioned this burden-shifting process, we think it was properly applied. Under that process, the French defendants' motion to dismiss with its attached declarations effectively shifted the burden to the Gerdings to identify materials of record showing that the defendants were not entitled to immunity, i.e., that the commercial activity exception did apply. The French defendants' motion with attachments actually went further than was required to carry their

initial production burden. Their attachments easily established prima facie that they fit the "foreign state" definition; they also showed prima facie why each of the exceptions in the FSIA was inapplicable. They need only have done the former. As the Fifth Circuit recently explained:

> [t]he party seeking immunity has no obligation to affirmatively eliminate all possible exceptions to sovereign immunity. Once a party demonstrates to the district court that it is a "foreign state" potentially entitled to immunity under the FSIA, the burden shifts to the opposing party to raise the exceptions to sovereign immunity and assert at least some facts that would establish the exceptions.

Stena Rederi AB v. Comision de Contratos del Comite, 923 F.2d 380, 390 n. 14 (5th Cir.1991). Here, the issue on which immunity turned, whether the commercial activity exception applied to avoid the defense of immunity that had been prima facie established, was clearly before the court by virtue of the French defendants' anticipatory avoidance of its application (along with that of all other exceptions), and the Gerdings' specific and sole reliance upon it in their opposition to the motion to dismiss. And on this dispositive issue, the defendants did have the ultimate burden of persuasion. We think the district court properly found, with due regard for the burden's cast, that on the record before it the commercial activity exception did not apply, hence that immunity was established.

That exception is expressed in § 1605(a)(2):

> (a) A foreign state shall not be immune from the

> jurisdiction of courts of the United States or of the States in any case – . . .
>
> (2) in which the activity is based upon a commercial activity carried on in the United States by the foreign state; . . . .

Sections 1603(d) and 1603(e) define "commercial activity" for the purposes of the FSIA:

> (d) A "commercial activity" means either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose.
>
> (e) A "commercial activity carried on in the United States by a foreign state" means commercial activity carried on by such state and having *substantial contact* with the United States.

28 U.S.C. §§ 1603(d), (e) (emphasis added). In addition to the express requirement that the commercial activity have "substantial contact" with the United States, the FSIA has been interpreted to also require a nexus between the commercial activity in the United States and the plaintiff's cause of action. *Vencedora Oceanica Navigacion, S.A. v. Compagnie Nationale Algerienne de Navigation,* 730 F.2d 195, 202 (5th Cir.1984). We agree that this is implicit in the statute.

Applying these provisions, the district court concluded that

on the undisputed facts of record before the court, the commercial activity of the French defendants in the United States upon which the Gerdings relied was so "isolated and transitory," that it did not meet either the substantial contact or the nexus requirement. We can find no error in this determination.

The commercial acitivity relied on by the Gerdings included chef de mission Jean Genoux's attendance at the July 1987 planning meeting in Morristown, New Jersey; the *N/C Leon Thevenin's* presence at the Wilmington, North Carolina port; the loading of cable onto the *N/C Leon Thevenin* at AT & T's facility in Newington, New Hampshire; and the *N/C Leon Thevenin's* presence at Port Covington, Maryland where it picked up AT & T engineers and a new French crew. The Gerdings also argue that the *N/C Leon Thevenin* must have entered into commercial contracts while it was docked at Wilmington and at other United States ports.

When the district court examined these contacts it found that the Gerdings had not satisfied the due process "minimum contacts" standard, much less the FSIA's "substantial contacts" requirement. *See Zedan v. Kingdom of Saudi Arabia,* 849 F.2d 1511, 1513 (D.C.Cir. 1988) ("We have previously held, moreover, that this substantial contact requirement is stricter than that suggested by a minimum contacts due process inquiry . . . "). The legislative history of the FSIA supports the district court's analysis. The House Report describes "substantial contact" as including

> cases based on commercial transactions performed in whole or in part in the United States, import-export transactions involving sales to, or purchases from, concerns in the United States, business torts

> occurring in the United States . . . and an indebtedness incurred by a foreign state which negotiates or executes a loan agreement in the United States, or which receives financing from a private or public lending institution located in the United States ...

H.R.Rep. No. 94-1487, 94th Cong., 2d Sess., *reprinted in* 1976 U.S.Code Cong. & Admin.News 6604, 6615-16.

Here, Genoux's attendance at the New Jersey meeting and the activities of the *N/C Leon Thevenin* were in furtherance of the ACMA and the particular mission that AT & T was undertaking for Spain's Telefonica. It was not the French defendants' commercial decision to use the *N/C Leon Thevenin* in the United States; rather the ship was in Wilmington only because that was the zone assigned to it by the ACMA. Genoux's attendance at the New Jersey meeting is insufficient to show substantial commercial activity of the French defendants within the United States, because the meeting apparently concerned planning a mission by the ACMA to repair a Spanish cable on the high seas. The actual commercial activity being planned was not going to take place in the United States. As the District of Columbia Circuit recently held, "[n]othing in the legislative history suggests, however, that Congress intended jurisdiction under the first clause to be based upon acts that are not themselves commercial transactions, but that are mere precursors to commercial transactions." *Zedan,* 849 F.2d at 1513; *see also Maritime International Nominees Establishment v. Republic of Guinea,* 693 F.2d 1094, 1109 (D.C.Cir.1982) (holding that two business meetings in the United States were not "more than 'transitory' and 'insubstantial' contact for purposes of the Act

[FSIA], . . . especially given their uncertain scope and importance").

Moreover, even if the Gerdings had satisfied the "substantial contact" requirement, they still would not be able to fulfill the FSIA's nexus requirement. As the Fifth Circuit recently explained,

> We do not suggest that the commercial activities exception requires a *direct causal* connection . . . Nonetheless, the connection between the cause of action and the sovereign's commercial acts in the United States must be *material*. Isolated or unrelated commercial actions of a foreign sovereign in the United States are insufficient to support a commercial activities exception to sovereign immunity.

Stena Rederi, 923 F.2d at 387 (citations omitted). The Gerdings contend that Genoux's attendance at the New Jersey meeting and his failure to ask for medical records of Bell Labs employees was directly connected to their cause of action against the French defendants. However, the Gerdings can point to no matters of record suggesting that Genoux had any duty or obligation to ask for medical records at all, or that the New Jersey meeting would have been the place to ask for such records. Apparently this meeting was held to plan the technical aspects of the upcoming mission. The Gerdings have not shown that this meeting had a material connection with Leslie Gerding's death.

In addition, the contacts that involve the *N/C Leon Thevenin's* presence in United States waters have no material connection with the Gerdings' cause of action. The Gerdings' case has nothing to do with the *N/C Leon Thevenin's* stops at ports

in New Hampshire and Maryland to pick up equipment and crew. Even if the Gerdings could show that the *N/C Leon Thevenin* entered into numerous commercial contracts while it was berthed at United States ports, these contracts would not have any connection to Leslie Gerding's death.

IV.

In sum, we hold first that the Gerdings have not shown that their case presents the "exceptional circumstances" that warrant remand to the district court to allow pursuit of previously unsought discovery. And on the merits we conclude that on the record before it, the district court did not err in determining that the French defendants were entitled to immunity under the FSIA.

AFFIRMED.

APPENDIX B — ORDER AND MEMORANDUM OPINION OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND FILED OCTOBER 29, 1990

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

WN — 89-2874

CHRISTOPHER GERDING, Administrator of the Estate of LESLIE MARGARET GERDING, et. al.

v.

REPUBLIC OF FRANCE, MINISTERE DES POSTES ET DES TELECOMMUNICATIONS ET DE LA TELEDIFFUSION, et. al.

ORDER

In accordance with the foregoing Memorandum and for the reasons stated therein, IT IS this 25th day of October 1990, by the United States District Court for the District of Maryland, ORDERED:

1. That the motion of defendants' to dismiss BE, and the same hereby IS, GRANTED;

2. That this case shall be entered as CLOSED;

3. That the Clerk of Court shall mail copies of the foregoing Memorandum and this Order to all counsel of record.

s/ William M. Nickerson
William M. Nickerson
United States District Judge

Appendix B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

CIVIL ACTION NO. WN-89-2874

CHRISTOPHER GERDING, Administrator of the Estate of LESLIE MARGARET GERDING, et. al.

v.

REPUBLIC OF FRANCE, MINISTERE DES POSTES ET DES TELECOMMUNICATIONS ET DE LA TELEDIFFUSION, et. al.

MEMORANDUM

During the early hours of October 28, 1987, while on the high seas off the coast of Spain aboard the vessel T/C *Leon Thevenin*, Leslie Margaret Gerding ("Gerding") died from diabetic ketoacidosis. Plaintiffs, the survivors and heirs of Gerding, seek to hold liable several French national entities ("the French National defendants"). For the reasons set forth French National defendants enjoy sovereign immunity and thus, this Court lacks subject matter jurisdiction over the claims against them.

The complaint names as defendants the Republic of France, Ministere des Postes, des Telecommunications et de la Telediffusion (currently designated the Ministere des Postes, des Telecommunications et de l'Espace ("the Ministry"), the Direction des Telecommunications du Reseau Exterieur ("DTRE"), Direction des Telecommunications Sous-Marines ("DTS"), France Cables et Radio ("FCR"), the Companie Francaise des Cables Sous-Marins (currently designated Compagnie Generales des

Communications, S.A.) ("COGECOM"), and the N/C *Leon Thevenin*[1] Pursuant to Fed. R. Civ. P. 12(b) (1), (2), (3), (4) and (5), the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. § 1602 *et. seq.*, the French National defendants move to dismiss the complaint. (Paper Number 24). An opposition and reply has been submitted. (Paper Numbers 29 AND 31). After careful consideration, this Court finds that no hearing is necessary. Local Rule 105.6. For the reasons stated below, the motion to dismiss shall be granted.

1. FACTUAL BACKGROUND

The genesis of this litigation began with AT&T's sale of a prototype undersea fiber optic deep water cable system, called Optician 1, to Compania Telefonica Nacional de Espana ("Telefonica") in 1983. The sales contract required AT&T to install and maintain Optican 1 between the Canary Islands. After its completion in 1985, Telefonica entered Optican 1 into the Atlantic Cable Maintenance Agreement ("ACMA"). The ACMA is a London-based unincorporated compact of governments and companies which own or repair cables in the Atlantic Ocean. Opposition at 1-Deposition of Henry M. Rickman, Exhibit B

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1. Also named as defendants were AT&T/Bell Laboratories ("Bell Labs"), American Telephone & Telegraph Company ("AT&T") and Transoceanic Cable Ship Company. These claims reached a settlement consummated by the execution of a settlement agreement and joint torfeasor release. At the time of settlement a motion for summary judgment was pending. (Paper Number 32). That motion is now moot. The remaining defendants are Claude Voiry, M.D. ("Dr. Voiry"), the ship's doctor, the Atlantic Cable Maintenance Association, and Compania Telefonica National de Espana, a/k/a CTNE ("Telefonica"). The record indicates that these defendants have yet to be served.

Paper Number 29). [2] ACMA participants include Telefonica, AT&T, France Telecom, and France Cables & Radio. ACMA functions as a maintenance related organization of "cable ships," each owned individually by various participants, that service the cable repair needs of any ACMA member. Each ACMA entity enters its cable into the registry of the organization. If an enrolled cable needs repair, any participant may request that ACMA's management Committee, chaired by Henry Rickman ("Rickman") of AT&T, assign the ship for repairs. The cable owner pays the operational costs of the cable ship performing the repair. The various cable ships are assigned "zones" in which they maintain a "standby" status until a repair mission is assigned.

Optican 1 failed upon its completion. An investigation disclosed that sharks were biting and damaging the cable. AT&T asked its research and development organization, Bell Labs ("Bell Labs"), to develop and manufacture an armored Fish Bite Protected ("FBP") fiber optic cable. Among the Bell Labs personnel assigned to develop FBP was Leslie Gerding. Following the development of FBP, AT&T agreed to replace the existing Optican 1 cable with the new FBP cable. Telefonica agreed to pay the costs associated with the use of the ACMA cable ship to install the FBP cable.

The ACMA assigned the French ship *N/C Leon Thevenin* as the ship to perform the repairs on the Optician 1 cable. The *Leon Thevenin is* owned wholly by the FCR and is designed and used solely for the maintenance and repair of undersea communications cable. The ship's captain is Jean Bonhomme,

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2. All references to exhibits refer to plaintiff's attachments to their opposition to AT&T' s motion for summary judgment.

and Jean Genoux acted as "Chef de Mission" during the *Leon Thevenin'* Optician 1 mission.

In late July, 1987, AT&T's personnel in charge of the Optician 1 mission convened a meeting to discuss a plan for the mission. Genoux, acting as a representative of the *Leon Thevenin,* attended the meeting. In September, 1987, the ACMA released the *Leon Thevenin* from its "standby" status to the Optician 1 mission. The ship immediately sailed to New Hampshire to load the new FBP cable. From the New Hampshire port, the vessel traveled to Baltimore to load AT&T's and Bell Labs' testing equipment, engineers and splicers, and changed its French crew. Thereafter, the *Leon Thevenin* sailed for the Canary Islands.

Gerding boarded the vessel in late October, 1987, while anchored off the Canary Islands. Upon her arrival, Gerding did not notify the captain, Chef de Mission or any other personnel that she suffered from diabetes. Her duties entailed the supervision of recovering and storing cable and implantation of the new cable. During the voyage, the vessel encountered severe inclement weather. By the evening of October 25, 1987, Gerding became quite seasick. Two days later, she was admitted to the ship's infirmary. Early the next morning, Gerding died.

Plaintiffs filed this matter asserting three causes of action: (1) a claim under the Jones Act, 46 U.S.C. § 688 *et seq.;* (2) a claim for unseaworthiness; and (3) a claim under the Death on the High Seas Act ("DOHSA"), 48 U.S.C. § 761-768. The defendants subsequently moved to dismiss the complaint primarily asserting this Court's lack of subject matter jurisdiction.[3]

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3. A motion to dismiss based on a claim of lack of subject matter (Cont'd)

Appendix B

II. MERITS

By enacting FSIA, Congress codified procedures for actions commenced against foreign states providing a comprehensive set of guidelines as to when and how parties may maintain an action against a foreign state in the courts of the United States and when a foreign state is entitled to sovereign immunity. H.R. Rep. No. 1487, 94th Cong., 2d Sess. 6, *reprinted in* 1976 U.S. Code Cong. & Admin. News 6604.

Section 1330 of Title 28 of the United States Code, which governs subject matter and personal jurisdiction in actions against foreign states in the courts of the United States, states in relevant part:

> (a) The district courts shall have original jurisdiction without regard to amount in controversy of any nonjury civil action againt a foreign state as defined in section 1603(a) of this title as to any claim for relief in personam with respect to which the foreign state is not entitled to immunity either under section 1605-1607 of this

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(Cont'd)
jurisdiction may take one of two forms. The first attacks the complaint' s failure to comply with Rule 8 (a) (1), which means that the allegations are insufficient to show that the federal court has jurisdiction over the subject matter. The other method challenges the substantive allegations of the complaint arguing the court's actual lack of subject matter jurisdiction. In considering a Rule 12(b) (1) motion, the complaint will be broadly and liberally construed. Fed. R. Civ. P. 8(f); *Scheuer v. Rhodes*, 416 U.S. 232 (1974). All allegations are to be assumed true. Nevertheless, the burden of proof on a Rule 12(b) (1) motion is on the party asserting jurisdiction. *Hare v. Family Publications Service, Inc.*, 334 F. Supp. 953 (D.Md. 1971).

> title or under any applicable international agreement.
>
> (b) Personal jurisdiction over a foreign state shall exist as to every claim for relief over which the district courts have jurisdiction under subsection (a)....

28 U.S.C. § 1330 (1966 Supp. 1990). For original jurisdiction to exist, however, the claim against the foreign state must fall within an exception to the basic premise, set forth in 28 U.S.C. § 1604 (1982), that foreign states generally are immune from the jurisdiction of federal courts. *Martin v. Republic of South Africa*, 836 F.2d 91, 93 (2d Cir. 1987). Section 1604 of Title 28 states:

> Subject to existing international agreements to which the United States is a party at the time of enactment of this Act a foreign state shall be immune from the jurisdiction of the courts of the United States and of the states except as provided in sections 1605 to 1607 of this chapter.

28 U.S.C. § 1604 (1972 Supp. 1990). For section 1604 to be applicable, the entity asserting immunity must be a "foreign state." That term is defined in 28 U.S.C. § 1603(a) as follows:

> (a) A "foreign state," . . ., includes a political subdivision of a foreign state or any agency or instrumentality of a foreign state as defined in subsection (b).
>
> (b) An "agency or instrumentality of a foreign state" means any entity—

> (1) which is a separate legal person, corporate or otherwise, and
>
> (2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state of political subdivision thereof, and
>
> (3) which is neither a citizen of a State of the United States as defined in section 1332(c) and (d) of this title, nor created under the laws of any third country.

Id. There is no dispute that the French National defendants are considered to be a "foreign state" under the FSIA definition.[4]

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4. The Ministry is a unit of the French national Government responsible for France's mail, telecommunications, and satellite operations. The DTRE is an agency operating within the Ministry and, in turn, DTS is a subdivision of DTRE. The Ministry, DTRE and DTS have no operations, employees or property within the United States. Motion of defendants to dismiss, Exhibit B (Declaration of Marcel Roulet, Director General of France Telecom) (Paper Number 24). Both FCR and COGECOM are known as *societe anonyme*, a corporation organized and existing under the laws of France. All but an infinitesimal percentage of FCR's shares are owned by the Republic of France through COGECOM. The sole funtion of COGECOM is to hold shares of certain companies on behalf of the French state. Neither does FCR or COGECOM maintain an office or place of business or conduct any activity in the United States related to the maintenance and repair of undersea telecommunications cable. *Id.* Exhibit C (Declaration of Michel Caillard, General Counsel of FCR) (Paper Number 24). The *Leon Thevenin is* owned by FCR and, thus, constitutes an instrumentality of France.

Appendix B

To pierce the sovereign immunity veil, a plaintiff bears the burden of demonstrating the applicability of the exceptions created to the general rule of immunity. The "exceptions" to the general rule of sovereign immunity are fully set forth in 28 U.S.C. 1605(a). Plaintiffs' complaint fails to identify the basis or "exception" upon which this case relies. Nevertheless, in their response to the motion to dismiss, plaintiffs rely only on the "commercial activity" exception set for section 1605(a)(2)[1], which states:

> (a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case
>
> (2) [1] *in which the action is based upon a commercial activity carried on in the United States by the foreign state;* [2] or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or [3] or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States.

28 U.S.C. § 1605(a)(2) (1972 Supp. 1990) (emphasis supplied). Sections 1603(d) & (e) of FSIA defines "commercial activity" as:

> (d) A "commercial activity" means either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct

> or particular transaction or act, rather than by reference to its purpose.
>
> (e) A "commercial activity carried on in the United States by a foreign state" means commercial activity carried on by such state and having substantial contact with the United States.

28 U.S.C. 1603(d) & (e) (1982). In addition to the requirement of "substantial contact" set forth in 1603(e), courts construing the applicability of 1605(a)(2)[1] require proof of a "nexus" between the commercial activity of the defendant and the plaintiff's cause of action. The facts as presented, taken as true and construed in a light most favorable to the plaintiff, fail to establish either that the defendant's alleged commercial activity had "substantial contact" with the United States or that a sufficient "nexus" exists between that commercial activity and the plaintiff's claims.

1. *Substantial Contact*

In *Zedan v. Kingdom of Saudi Arabia,* 849 F.2d 1511 (D.C. Cir. 1988), the Court of Appeals for the District of Columbia discussed the degree of contact that would establish a "substantial contact." Citing FSIA's legislative history, the court reviewed examples of substantial contact:

> [These include] cases based on commercial transactions performed in whole or in part in the United States, import-export transactions involving sales to, or purchases from, concerns in the United States, business torts occurring in the United States (cf. 1605 (a)(5)), and an indebtedness incurred by a foreign state which negotiates or executes a

> loan agreement in the United States, or which receives financing from a private or public lending institution located in the United States — for example, loans, guarantees or insurance provided by the Export-Import Bank of the United States . . . This definition, however, is intended to reflect a degree of contact beyond that occasioned simply by U.S. citizenship or U.S. residence of the plaintiff.

Zedan, 849 F.2d at 1513 (*citing* H.R. Rep. No. 1487, 94th Cong., 2d Sess. 17 (1976), U.S. Code Cong. & Admin. News 1976 at 6604, 6615, 6616). The Court further stated, "[w]e have previously held, moreover, that this substantial contract requirement is stricter than that suggested by a minimum contacts due process inquiry, and that *isolated or transitory contacts with the United States do not suffice.*" *Zedan*, 849 F.2d at 1513 (*citing Maritime Int'l. Nominees Establishment v. Guinea*, 693 F.2d 1094, 1109 (1982), *cert. denied*, 464 U.S. 815 (1983). Other courts have recognized that the degree of contact required by the "substantial contact" requirement is greater that that which could suffice to support personal jurisdiction under a non-FSIA constitutional due process standard. *See e.g., Maritime Int'l. Nominees Establishment v. Republic of Guinea*, 693 F.2d 1094, 1105-09 (D.C. Cir. 1982); *Magnus Electronics, Inc. v. Argentine Republic*, 637 F. Supp. 487, 493 (N.D. Ill. 1986), (*citing Verlinden, B. V. v. Central Bank of Nigeria*, 488 F. Supp. 1284, 1295-96 (S.D.N.Y. 1980), *aff'd on other grounds*, 647 F.2d 320 (2nd Cir. 1981), *rev'd on other grounds*, 461 U.S. 480 (1983)).

The plaintiffs contend that "the French National defendants established commercial activities, with substantial contact with the United States, when they: (1) agreed to provide the N/C *Leon*

Thevenin to help AT&T/Bell Labs perform repairs on Telefonica's cable; (2) dispatched Chef de Mission Jean Genoux to Morristown, New Jersey, to attend the July 29-30, 1987 meetings convened and chaired by AT&T to discuss the cable repairs; (3) dispatched its cable ship, the N/C *Leon Thevenin* to AT&T's depot in Wilmington, NORTH Carolina for an extended period so that the ship could wait in port as ACMA's West Zone "standby"; (4) accepted orders from AT&T sending the N/C *Leon Thevinin* from Wilmington to Newington, New Hampshire to load and store AT&T's cable; (5) permitted AT&T employees to board and inspect the N/C *Leon Thevenin* while it was in Newington to insure that the cable was properly taken aboard and stowed; (6) accepted orders from AT&T to sail from Newington to AT&T's Port Covington, Maryland, depot; (7) docked at AT&T's Port Covington, Maryland, depot and permitted AT&T employees to board for the journey to the Canary Islands; (8) changed French crews at AT&T's Port Covington depot; and (9) permitted AT&T employees to exert very considerable control over the N/C *Leon Thevenin* on the trip to the Canary Islands and while the ship was performing AT&T's repairs between the Canary Islands." Opposition at 18-20 (Paper Number 29).

The nature of these "contacts" are both isolated and transitory. The agreement to allow the N/C *Leon Thevenin* to perform the cable repair on Telefonica's cable was made pursuant to the ACMA compact. The election of the N/C *Leon Thevenin* was not a part of a commercial enterprise undertaken by the French National defendants which entailed a substantial contact with this country. The purpose of the repair mission was to replace the Spanish cable off the Canary Islands. The fact that this mission required the N/C *Leon Thevenin* to travel to the United States to load cable, dock in various state ports, and change its crews does not amount to substantial contact envisioned by Congress

when enacting FSIA. Additionally, Genoux's participation in the technical meetings held and organized by AT&T does nothing further in establishing the requisite degree of contact. Simply put, the French National defendants' contacts with this forum do not establish the necessary predicate contacts required by FSIA, nor would they establish "minimum contacts" under a due process analysis. *See, e.g., Asahi Metal Ind. v. Superior Court of California, Solano County,* 480 U.S. 102 (1987); *World Wide Volkswagon Corp. v. Woodson,* 444 U.S. 286 (1980); *Hanson v. Denckla,* 357 U.S. 235 (1958).

2. *Nexus*

Courts construing section 1605(a)(2)[1] have held that it "is essential that there be a nexus between the plaintiff's grievance and the sovereign's commercial activity [in the United States]." *Velidor v. L/P/G. BENGHAZI,* 653 F.2d 812, 820 (3d Cir. 1981), *cert. dismissed,* 455 U.S. 929 (1982); *accord America West Airlines, Inc., v. GPA Group, Ltd.,* 877 F.2d 796 (9th Cir. 1989); *Vencedora Oceanica Navigacion, S.A. v. Compagnie Nationale Algerienne de Navigation,* 730 F.2d 195, 199-204 (5th Cir. 1984). "The commercial activity relied on by [the plaintiff] to establish jurisdiction must be the activity upon which the lawsuit is based. The focus must be solely upon 'those *specific* acts that form the basis of the suit.'" *America West,* 877 F.2d at 796-97 (citations omitted; emphasis in original *(quoting Joseph v. Office of the Consulate General,* 830 F.2d 1019, 1023 (9th Cir. 1987), *cert. denied,* 485 U.S. 905 (1988)).

Plaintiffs claim that this "nexus" requirement is established by Genoux's attendance at the technical meetings held by AT&T. Under plaintiffs' theory, Genoux's failure during this meeting or at any time later, to require a medical check or exam of all AT&T

personnel who were to report to the *Leon Thevenin* was a proximate cause in Gerding's death. This argument strains logic. The purpose of the June 1987 technical meeting was to review the plan as created and designed by AT&T for the replacement of the cable. Genoux's role at this meeting was to act simply as the liaison for the *Leon Thevenin*. There is no evidence to suggest that, if medical exams or the possibility thereof were discussed at this meeting, Gerding's death would not have occurred. Indeed, it could be argued that Gerding's own failure to alert the ship's medical staff of her diabetic condition was perhaps a contributing cause to her death. Construing the facts as presented in a light most favorable to the plaintiffs, the Court finds that there exists no nexus, as required under FSIA, between their cause of action and the defendants' alleged commercial acts in this country.

III. CONCLUSION

For the reasons stated above,[5] the French National defendants enjoy sovereign immunity. Accordingly, defendants' motion to dismiss shall be granted by separate order.

s/ William M. Nickerson
WILLIAM M. NICKERSON
United States District Judge

Dated: October 25, 1990.

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5. Since the Court finds that the necessary requirements underlying the applicability of the claimed exception in this case, 28 U.S.C. § 1605(a)(2)[1], have not been established, defendants' remaining arguments as to the deficiency of service of process and venue need not be addressed.